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Westlands Water District

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

HOOPA VALLEY TRIBE,

Plaintiff,

v.

UNITED STATES BUREAU OF  
RECLAMATION; DAVID BERNHARDT, in  
his official capacity as Secretary of the Interior;  
BRENDA BURMAN, in her official capacity  
as Commissioner of the United States Bureau  
of Reclamation; ERNEST CONANT, in his  
official capacity as U.S. Bureau of Reclamation  
California-Great Basin Regional Director; and  
UNITED STATES DEPARTMENT OF THE  
INTERIOR,

Defendants.

Case No. 1:20-cv-01814-DAD-EPG

**WESTLANDS WATER DISTRICT'S  
NOTICE OF MOTION, MOTION, AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO INTERVENE AS  
DEFENDANTS**

Hearing Date: June 15, 2021  
Time: 9:30 a.m.  
Courtroom: 5 – 7<sup>th</sup> Floor, Fresno  
Judge: Hon. Dale A. Drozd

Trial Date: None  
Date Action Filed: August 13, 2020

**NOTICE OF MOTION AND MOTION TO INTERVENE**

TO THE COURT AND ALL PARTIES HEREIN:

PLEASE TAKE NOTICE THAT on June 15, 2021 at 9:30 a.m. in Courtroom 5, before Judge Dale A. Drozd, Westlands Water District (“Westlands” or “Intervenor”) will, and hereby does, move the Court for an order allowing it to intervene as of right or, alternatively, permissively, in the above entitled action as a defendant.

Westlands is already a party in one case related to this action, *North Coast River Alliance, et al. v. Bernhardt, et al.*, E.D. Cal., No. 1:16-cv-00307-DAD-SKO (“NCRA”), and the Court has recently granted Federal Defendants’ motion to compel joinder of required parties, including Westlands, in another, *Center for Biological Diversity, et al. v. Bernhardt, et al.*, E.D. Cal., No. 1:20-cv-00706-DAD-EPG (“CBD”). See Order Granting Motion to Compel Joinder of Absent Contractors and Granting Unopposed Motion to Amend, Feb. 16, 2021, CBD ECF No. 23 (“CBD Order”). In addition, the motion to dismiss in this case that Federal Defendants filed in the Northern District before this case was transferred to the Eastern District argued that water contractors such as Westlands are required parties in this case. ECF No. 19. On March 12, 2021, in response to this Court’s March 4, 2021 Minute Order, ECF No. 46, Federal Defendants filed an unopposed motion to stay this case for 60 days to give the new administration time to review this lawsuit and determine whether to re-notice the pending motion to dismiss. ECF No. 47. The Court granted on March 15, 2021, staying this case for 60 days. ECF No. 48. Westlands now moves to intervene in this case in order to comply with the direction in the Court’s March 4th Minute Order that Westlands refile its motion to intervene (which was also initially filed in the Northern District before this case was transferred, ECF No. 31), and ensure Westlands is able to participate in this case, along with the other related cases noted above, in order to protect its interests.<sup>1</sup>

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<sup>1</sup> In the event other water districts whose contracts may be affected by this lawsuit are deemed parties required to be joined under Rule 19, this motion may be mooted. Whether Westlands is granted intervention or, alternatively, is deemed a required party, its interests in protecting its rights in this proceeding are the same.

1 Westlands' motion to intervene as of right as a defendant is made pursuant to Federal Rule  
2 of Civil Procedure 24(a) upon the ground that Westlands, as a party to water contracts that  
3 Plaintiff seeks to invalidate in this action, claims an interest relating to the property or transaction  
4 that is the subject matter of this action, and is so situated that disposing of the action may as a  
5 practical matter impair or impede its ability to protect its interest, which is not adequately  
6 protected by existing parties. Alternatively, this motion is made pursuant to Rule 24(b) upon the  
7 ground that Westlands has a claim or defense that shares with the main action a common question  
8 of law or fact.

9 This motion is based on this notice; the accompanying memorandum in support of this  
10 motion; any subsequently filed supplemental memorandum and accompanying papers; and the  
11 pleadings, records and files in this action and such other matters as the Court may consider.

12 The undersigned counsel, Cynthia J. Larsen, certifies that pursuant to this Court's  
13 Standing Order, she conferred with counsel for Plaintiff and Federal Defendants. Plaintiff has not  
14 yet reached a determination concerning its position on the motion. Federal Defendants do not  
15 oppose the motion.

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MEMORANDUM OF POINTS AND AUTHORITIES

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1 **I. INTRODUCTION**

2 Westlands submits this memorandum in support of its motion to intervene as of right in  
 3 this action as a defendant pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.<sup>2</sup> This  
 4 lawsuit seeks to invalidate repayment contracts the Bureau of Reclamation (“Reclamation” or  
 5 “Bureau”) entered as directed by and pursuant to the Water Infrastructure Improvements for the  
 6 Nation (“WIIN”) Act, Pub. L. No. 114-322, 130 Stat. 1628 (2016) (“Repayment Contracts”).  
 7 Several of the repayment contracts are held by Westlands.<sup>3</sup> Invalidating Westlands’ Repayment  
 8 Contracts would not only directly impair Westlands’ legally protected interests in its Repayment  
 9 Contracts, but this case is also substantially similar to two other cases currently pending before  
 10 this Court that challenge the same contracts on nearly identical grounds. Westlands is already a  
 11 party to one of these cases, *North Coast River Alliance, et al. v. Bernhardt, et al.*, E.D. Cal., No.  
 12 1:16-cv-00307-DAD-SKO (“NCRA”), and the Court has recently granted a motion to compel  
 13 joinder of required parties, including Westlands, in the other, *Center for Biological Diversity, et*  
 14 *al. v. Bernhardt, et al.*, E.D. Cal., No. 1:20-cv-00706-DAD-EPG (“CBD”). Order Granting  
 15 Motion to Compel Joinder of Absent Contractors and Granting Unopposed Motion to Amend,  
 16 Feb. 16, 2021, CBD ECF No. 23. Plaintiff’s Second Claim for Relief, alleging violations of the  
 17 National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and the Administrative  
 18 Procedure Act (“APA”), 5 U.S.C. § 501 *et seq.*, are virtually identical to the NEPA and APA  
 19 claims by plaintiffs in the already related NCRA and CBD cases. *See* Notice of Related Case,  
 20 ECF No. 10.

21 This lawsuit by the Hoopa Valley Tribe (“Plaintiff”) seeks both declaratory and injunctive  
 22 relief against defendants Reclamation, David Bernhardt,<sup>4</sup> in his official capacity as Secretary of  
 23 the Interior, Brenda Burman, in her official capacity as Commissioner of the United States

24 \_\_\_\_\_  
 25 <sup>2</sup> All further Rule references are to the Federal Rules of Civil Procedure, unless otherwise indicated.

26 <sup>3</sup> The contracts that Plaintiff challenges in this lawsuit and that Westlands seeks to protect include  
 27 Repayment Contracts of both Westlands and Westlands Water Distribution Districts No. 1 and 2. For  
 purposes of this motion, these contracts are referred to as “Westlands’ Repayment Contracts” or  
 “Repayment Contracts.”

28 <sup>4</sup> Defendant Bernhardt resigned as Secretary of the Interior on January 20, 2021; his replacement, Rep.  
 Deb Haaland, is pending Senate confirmation.

Bureau of Reclamation, Ernest Conant, in his official capacity as U.S. Bureau of Reclamation California-Great Basin Regional Director, and United States Department of the Interior (collectively, “Federal Defendants”). Plaintiff’s Complaint asks the Court, in part, for “an order and judgment setting aside, declaring invalid, and rescinding Reclamation’s conversion of certain” interim renewal contracts into Repayment Contracts, “including but not limited to [Westlands’] Contract No. 14-06-200-495A-IR1-P [ ] due to Reclamation’s failure to comply with” the Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4600 (“CVPIA”), NEPA, and the APA Complaint (“Compl.”), ECF No. 1, ¶ 2.<sup>5</sup>

Westlands files this motion to protect its contractual interests placed directly at issue by Plaintiffs’ substantive claims. As a contracting party with Reclamation under the Repayment Contracts, which Plaintiff challenges in this action, Westlands “claim[s] an interest relating to the property or transaction that is the subject of the action” under Rule 24. Moreover, any disposition of the action in Westlands’ absence would impair Westlands’ ability to protect its interests. Finally, Westlands’ interests, like the interests of the other absent CVP water contractors, are not and indeed cannot be fully represented by Federal Defendants. *See* Fed. R. Civ. P. 24(a)(2).

Westlands satisfies all requirements for intervention and is a necessary party to this action. Accordingly, Westlands respectfully requests that the Court grant its motion to intervene as of right as a defendant in this action pursuant to Rule 24(a). Alternatively, the Court should exercise its discretion to allow permissive intervention of Westlands pursuant to Rule 24(b).

## **II. BACKGROUND**

Enacted in December 2016, the WIIN Act addressed a number of water infrastructure issues across the country. Most pertinent to this case, section 4011 of the WIIN Act directed that, upon the request of any CVP water service contractor, “the Secretary of the Interior shall convert” the contractor’s water service contract to a repayment contract.<sup>6</sup> Congress was clear that all CVP

<sup>5</sup> Reclamation has likewise entered into substantially similar repayment contracts with numerous other water districts, municipalities, and industrial Central Valley Project (“CVP”) water contractors.

<sup>6</sup> Congress directed Reclamation to include in each repayment contract a provision that requires the CVP water contractors to prepay construction costs that otherwise would have been repaid to Reclamation over an extended period of time. *See* WIIN Act, § 4011(a). Further, upon repayment of a contractor’s obligation for construction costs of the CVP, subsections (a) and (b) of section 213 of the Reclamation



1 water service contracts converted shall “continue so long as the contractor pays applicable  
 2 charges, consistent with section 9(d) [and section 9(c)(1)] of the Act of August 4, 1939 (53 Stat.  
 3 1195), and applicable law.” WIIN Act, §§ 4011(a)(2)(D), 4011(a)(3)(C).

4 In February 2020, Reclamation and Westlands finalized their agreement to enter into  
 5 Repayment Contracts with an effective date of June 1, 2020,<sup>7</sup> which converted Westlands’ interim  
 6 renewal contracts into Repayment Contracts pursuant to the WIIN Act. *See* Bureau of  
 7 Reclamation Website, “Conversion Contracts,” *available at* [https://www.usbr.gov/mp/wiin-](https://www.usbr.gov/mp/wiin-act/negotiated-conversion-contracts.html)  
 8 [act/negotiated-conversion-contracts.html](https://www.usbr.gov/mp/wiin-act/negotiated-conversion-contracts.html) (last visited March 8, 2021). As Reclamation continued  
 9 its effort to convert other water service contracts, Plaintiff filed this lawsuit seeking to enjoin  
 10 Reclamation’s effort to enter into further repayment contracts and to rescind the repayment  
 11 contracts previously entered, including Westlands’ Repayment Contracts. *See* Compl., ¶ 2.

12 Federal Defendants thereafter filed a Motion to Transfer this action from the Northern  
 13 District to the Eastern District. *See* Transfer Mot., ECF No. 14. Federal Defendants later filed a  
 14 Motion to Dismiss Plaintiff’s suit partially on the grounds that Plaintiff failed to join CVP water  
 15 contractors, who are necessary parties in this action. *See* Mot. to Dismiss, ECF No. 19, at 16-18.  
 16 On December 21, 2020, the Northern District Court granted Federal Defendants’ Motion to  
 17 Transfer, ECF No. 32, and this action was reassigned to this Court pursuant to an Order of  
 18 Related Cases on December 30, 2020. ECF No. 37. On March 4, 2021, the Court issued a  
 19 Minute Order, directing, in part, that Westlands re-notice this Motion to Intervene. ECF No. 46.  
 20 On March 12, 2021, Federal Defendants moved unopposed to stay this case for 60 days to give  
 21 the new administration time to determine whether to re-notice the pending motion to dismiss,  
 22 ECF No. 47. The Court granted the motion, staying the case on March 15, 2021. ECF No. 48.

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 25 \_\_\_\_\_  
 26 Reform Act of 1982 (96 Stat. 1269) applies to lands within the contractor’s service area, which in turn  
 27 provides relief from the acreage and full cost limitations of federal reclamation law. *See* WIIN Act, §  
 28 4011(c)(1), Reclamation Reform Act of 1982, § 213.

<sup>7</sup> The Oro Loma Assignment Contract, which is partially assigned to Westlands, was executed in  
 September 2020, with an effective date of October 1, 2020. *See* Bureau of Reclamation Website,  
 “Conversion Contracts,” Contract No. 14-06-200-7823J-LTR1-P, *available at*  
<https://www.usbr.gov/mp/wiin-act/negotiated-conversion-contracts.html> (last visited March 8, 2021).

1 **III. ARGUMENT**

2 Rule 24 of the Federal Rules of Civil Procedure governs intervention. Rule 24  
 3 “traditionally has received a liberal construction in favor of applications for intervention.”  
 4 *Waller v. Financial Corp. of America*, 828 F.2d 579, 582 (9th Cir. 1987) (citations omitted); *Fed.*  
 5 *Sav. and Loans Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir.  
 6 1993); *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 671 (8th Cir. 2008) (“Rule 24  
 7 should be liberally construed with all doubts resolved in favor of the proposed intervenor.”)  
 8 (citation omitted). Rule 24(a) sets forth the requirements for intervention as of right:

9 On timely motion, the court *must* permit anyone to intervene who ... claims an interest  
 10 relating to the property or transaction that is the subject of the action, and is so situated  
 11 that disposing of the action may as a practical matter impair or impede the movant’s  
 ability to protect its interest, unless existing parties adequately represent that interest.

12 FED. R. CIV. P. 24(a)(2) (emphasis added). Further, Rule 24(b) permits permissive intervention as  
 13 follows: “On timely motion, the court may permit anyone to intervene who ... has a claim or  
 14 defense that shares with the main action a common question of law or fact.” FED. R. CIV. P.  
 15 24(b)(1)(B). As explained below, Westlands satisfies the requirements of both Rule 24(a)(2) and  
 16 Rule 24(b)(1)(B).

17 **A. Westlands Is Entitled To Intervene As A Matter Of Right Under Rule**  
 18 **24(A)(2)**

19 Generally, motions to intervene as a matter of right pursuant to Rule 24(a)(2) are reviewed  
 20 according the following four-part test:

- 21 1) the motion must be timely;
- 22 2) the applicant must claim a “significantly protectable” interest relating to the property or  
 transaction which is the subject of the action;
- 23 3) the applicant must be so situated that the disposition of the action may as a practical  
 matter impair or impede its ability to protect that interest; and
- 24 4) the applicant’s interest may be inadequately represented by the parties to the action.

25 *Wilderness Society v. United States Forest Service*, 630 F.3d 1173, 1177 (9th Cir. 2011);  
 26 *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996).

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1                   **1. Westlands' Motion To Intervene Is Timely**

2           Westlands' motion to intervene is timely given the early stage of this proceeding, coupled  
3 with the complete lack of prejudice to other parties that will result from the proposed  
4 intervention. "Timeliness is a flexible concept; its determination is left to the district court's  
5 discretion." *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). In  
6 determining whether a motion to intervene is timely, courts weigh three factors: 1) the stage of  
7 the proceeding at which an applicant seeks to intervene; 2) the prejudice to other parties; and  
8 3) the reason for and length of the delay. *Id.*

9           This case was filed on August 13, 2020, and no responsive pleadings have yet been filed,  
10 nor have any ruling been issued on Federal Defendants' Motion to Dismiss.<sup>8</sup> Plaintiff can make  
11 no viable claim of prejudice based on the proposed intervention. *See, e.g., Nikon Corp. v. ASM*  
12 *Lithography*, 222 F.R.D. 647, 649 (N.D. Cal. 2004) ("The fact that Zeiss's intervention will cause  
13 very little (if any) prejudice to Nikon only supports a finding of timeliness"). Based on these  
14 factors, the Motion to Intervene is timely.

15                   **2. Westlands Has An Interest Relating To The Property Or Transaction**  
16                   **Which Is The Subject Of The Action**

17                   **a. Westlands Has A Protectable Interest Sufficient To Warrant**  
18                   **Inclusion In This Action.**

19           The focus of a Rule 24 inquiry is whether the intervenor has a "'protectable interest' in the  
20 outcome of the litigation of sufficient magnitude to warrant inclusion in the action." *Smith v.*  
21 *Pangilinan*, 651 F.2d 1320, 1324 (9th Cir. 1981). "An applicant has a 'significant protectable  
22 interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a  
23 'relationship' between its legally protected interest and the plaintiff's claims." *Donnelly v.*  
*Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).

24           The Ninth Circuit has held that intervention as of right under Rule 24(a) is available to  
25 both private parties and government entities in NEPA suits against a federal agency, reversing  
26 prior limitations on such intervention. In *Wilderness Society v. United States Forest Service*, 630

27                   <sup>8</sup> As noted above, on March 15, 2021, this Court order the case stayed for 60 days to give the new  
28 administration time to decide whether to refile the motion to dismiss. ECF No 47.

1 F.3d 1173 (9th Cir. 2011), the Ninth Circuit reversed the district court’s denial of an application  
 2 by groups representing motorized vehicle users to intervene in a NEPA suit challenging the  
 3 Forest Service’s adoption of a plan designating roads for motorized vehicle use. Noting that it  
 4 “construe[s] the Rule ‘broadly in favor of proposed intervenors,’” the Ninth Circuit remanded the  
 5 case for reconsideration in light of its ruling that intervention is available in NEPA suits. *Id.* at  
 6 1179 (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)). The  
 7 Ninth Circuit recognized “the very real possibility that private parties seeking to intervene in  
 8 NEPA cases may, in certain circumstances, demonstrate an interest ‘protectable under some law,’  
 9 and a relationship between that interest and the claims at issue.” *Wilderness Society*, 630 F.3d at  
 10 1179.

11 In defining what constitutes a “protectable interest,” the Ninth Circuit has held that  
 12 “contract rights are traditionally protectable interests” sufficient to support intervention of right.  
 13 *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001) (“*Southwest*”).  
 14 In *Southwest*, an Endangered Species Act suit challenged the process by which federal agencies  
 15 entered into a contract with the City of San Diego, claiming that the federal agencies failed to  
 16 comply with statutory-mandated procedures prior to entering into a contract with a municipality.  
 17 *Id.* at 816. The court held that even private developers’ status as third-party beneficiaries of the  
 18 contract was a protectable right and allowed the developers to intervene. *Id.* at 822.

19 Other circuits likewise allow intervention of right by contractors in NEPA suits that  
 20 threaten their contracts. In *Kleissler v. United States Forest Service*, 157 F.3d 964, 968 (3rd Cir.  
 21 1998), public interest groups alleged that the Forest Service failed to prepare an EIS pursuant to  
 22 NEPA before approving timber contracts with private loggers and sought, indirectly, to revoke  
 23 the contracts. The Third Circuit allowed intervention of right by the contracting timber  
 24 companies, finding that the companies’ contract rights gave them “direct and substantial interests  
 25 in a lawsuit aimed at halting logging.” *Id.* at 972.

26 In the present action, the Repayment Contracts between Westlands and Reclamation are  
 27 expressly at issue. *See* Compl., ¶ 2; *see also* Compl. Exh. 2, ECF No. 1-2 (incorporating into the  
 28

Complaint fourteen (14) Repayment Contract conversions that were approved as of February 28, 2020, between Reclamation and absent CVP water contractors, six of which involve Westlands or its distribution districts as contracting parties). Under these expressly challenged repayment contracts, Westlands is entitled to purchase up to nearly 1,200,000 acre-feet of water annually. *See* Compl. Exh. 2. And Plaintiff has made clear in the Complaint its intention to (1) challenge in this action other Repayment Contracts which were approved on the same basis as Westlands' Repayment Contracts and (2) enjoin Reclamation's ability to enter into yet other repayment contracts. Compl., ¶ 2. Indeed, Plaintiff seeks an order, in part, setting aside and declaring invalid the repayment contracts, "including but not limited to" Westlands' Repayment Contracts, Compl., ¶ 2, and further pray for the Court to "[v]acate, set aside, rescind, and nullify all of Reclamation's contract conversions challenged herein." Compl. at 31 (Prayer for Relief "D").

Thus Westlands' contractual rights, threatened by Plaintiff's potential injunction and prayer to invalidate and rescind the Repayment Contracts, constitute an interest that is "protectable" under Ninth Circuit precedent.

**b. Westlands Is A Necessary Party Under Rule 19(a) And Thus Should Be Permitted To Intervene.**

Westlands' right to intervene under Rule 24(a) is underscored by the fact that it is a necessary party to this action under Rule 19(a). Under Rule 19(a) a party must be joined if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect the interest . . . ." Westlands must be joined because it holds contract rights that Plaintiff seeks to enjoin in this action. When determining whether a non-party is a necessary party that should be joined, the Court must determine whether "the absent [party] claim[s] an interest relating to the subject matter of the action, and [are] so situated that disposing of this action in their absence may impair or impede their ability to protect such interest." *Natural Resources Defense Council v. Kempthorne*, 539 F. Supp. 2d 1155, 1183 (E.D. Cal. 2008) ("NRDC").

Westlands is a necessary party to this suit by virtue of its legally protected interest in its Repayment Contracts at issue. The Ninth Circuit considers it a “fundamental principle” that “a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract.” *Dawavendawa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002). *NRDC* reaffirmed this principle by holding that absent water contractors were necessary parties to a lawsuit challenging administrative compliance by Reclamation with the Endangered Species Act prior to entering into water supply contracts. There, the court noted that “it is well-settled that in an action to set aside a contract, all parties to the contract must be present.” *NRDC*, 539 F. Supp. 2d at 1185.

Plaintiff’s Complaint requests “an order and judgment setting aside, declaring invalid, and rescinding Reclamation’s conversion of [the interim renewal contracts] into permanent [Repayment Contracts] . . . [and] further seeks an order enjoining Reclamation from converting or amending any additional CVP contracts that Reclamation is in the process of converting . . . .” Compl., ¶ 2. Accordingly, Westlands is a necessary party under *Dawavendawa* and *NRDC*.

Because Westlands is a necessary party to this action, its interest in this matter requires that the motion to intervene as of right be granted.

### 3. Westlands’ Interests May Be Impaired Or Impeded If Intervention Is Not Permitted

Westlands’ interests would be impaired or impeded, as a practical matter, if this Court were to dispose of this action in Plaintiff’s favor. If Reclamation’s entry into contracts with Westlands, among others, is determined to be improper in this lawsuit, Westlands’ ability to protect its interests and to defend the propriety of its contractual rights, at the trial or appellate level or in other actions, may well be foreclosed, as both a practical and legal matter. Plaintiff has asked the Court to enjoin Reclamation from “taking any action pursuant to the contract conversions.” Compl. at 31 (Prayer for Relief “E”). If the Court makes such an order, the significant financial and statutory benefits conferred to Westlands under Repayment Contracts pursuant to the WIIN Act could be lost. For example, the WIIN Act recognizes that each CVP

1 water contractor that converts to a repayment contract has a permanent right to water service “so  
 2 long as the contractor pays applicable charges, consistent with section 9(d) [and section 9(c)(1)]  
 3 of the Act of August 4, 1939 (53 Stat. 1195), and applicable law.” WIIN Act, §§ 4011(a)(2)(D),  
 4 4011(a)(3)(C). This contractual right under the Repayment Contract, as well as others, is  
 5 threatened in this action. *See* n.5. Thus, there can be no question that disposition of this action  
 6 without Westlands’ involvement could severely impair or impede its interests.

7 The Ninth Circuit has held that disposition of a suit challenging the contract that is the  
 8 source of an applicant’s protectable interest would as a practical matter impair or impede the  
 9 applicant’s ability to protect its interest. In *Southwest*, a suit challenging the validity of the  
 10 contract to which applicant developers were third-party beneficiaries, the court held that “for the  
 11 projects [...] in the pipeline for design and mitigation assurances and approval pursuant to the IA  
 12 [Implementation Agreement], an invalidation of the IA would both legally and practically affect  
 13 Applicants’ interests.” *Southwest*, 268 F.3d at 822 (noting that the Ninth Circuit “follow[s] the  
 14 guidance of Rule 24 advisory committee notes that state that ‘if an absentee would be  
 15 substantially affected in a practical sense by the determination made in an action, he should, as a  
 16 general rule, be entitled to intervene.’”) (internal citation omitted). Likewise, in *Sierra Club v.*  
 17 *United States Environmental Protection Agency*, 995 F.2d 1478 (9th Cir. 1993), a suit seeking to  
 18 modify the terms of a city’s water treatment permits, the Ninth Circuit held that “the relief sought  
 19 in Sierra Club’s lawsuit would necessarily ‘result in practical impairment of the [City’s]  
 20 interests.’” *Id.* at 1486 (quoting *Yniguez v. Arizona*, 939 F.2d 727, 735 (9th Cir. 1991)). In the  
 21 same way that the suits in *Southwest* and *Sierra Club* threatened to impair or impede the  
 22 applicants’ interests in challenged contracts, so does the present Complaint threaten to impair  
 23 Westlands’ interests by challenging its Repayment Contracts.

#### 24 4. **Westlands’ Interests Are Not Adequately Represented In The Present** 25 **Lawsuit**

26 The Supreme Court has held that the inadequate representation requirement “is satisfied if  
 27 the [proposed intervenor] shows that the representation of his interest ‘*may be*’ inadequate” and  
 28 that “the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine*



1 *Workers of America*, 404 U.S. 528, 538 n.10 (1972) (emphasis added). As the Supreme Court  
 2 observed in *Trbovich*, federal agencies are invested with the obligation of protecting “vital public  
 3 interest[s],” in that case, free and democratic union elections. *Id.* at 539. In *Trbovich* the issue  
 4 was whether a union member’s interest was adequately represented by the Secretary of Labor in a  
 5 suit by the Department of Labor challenging a union election. The Supreme Court cited the  
 6 obligation of the agency to also protect the wide public interest. As a result, the proposed private  
 7 party intervenor and the federal agency could not be assured of approaching the litigation in the  
 8 same way, because the federal agency’s interest “transcends the narrower interest of the  
 9 complaining union member.” *Id.* (citation omitted).

10 The Ninth Circuit uses the following three step inquiry to determine if a non-party is  
 11 adequately represented by existing parties:

12 A non-party is adequately represented by existing parties if: (1) the interests of the  
 13 existing parties are such that they would undoubtedly make all of the non-party’s  
 14 arguments; (2) the existing parties are capable of and willing to make such arguments; and  
 (3) the non-party would offer no necessary element to the proceeding that existing parties  
 would neglect.

15 *Southwest Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1153-54 (9th Cir. 1998) (citing  
 16 *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992)).

17 Consistent with *Trbovich*, the Ninth Circuit explained in *Southwest* that the current  
 18 representation of parties should be determined to be inadequate under Rule 24 where the  
 19 applicants’ interests and that of the existing defendants “may diverge,” and “because of the  
 20 difference in interests, it is likely that Defendants will not advance the same arguments as  
 21 Applicants.” *Southwest*, 268 F.3d at 824. Further describing how the federal government’s  
 22 interests diverge from other interests, the *Southwest* court described how “the priorities of the  
 23 defending government agencies are not simply to confirm the Applicants’ interests in the  
 24 [contracts],” but are instead to represent all the interests of the general public – which may, at  
 25 times, be adverse to those of the applicant. *Id.* at 823.

26 In *NRDC*, a suit against a federal agency challenging water contracts to which the agency  
 27 was a party, the court concluded that:

28 [T]he Federal Defendants cannot adequately represent the interests of absent



1 contractors because they represent the government and a broad set of interests that  
2 are not the same as public or private water contractors. [...] The Bureau is  
3 obligated to provide water under the contracts and to comply with the ESA at the  
4 same time. The Bureau may decide that complying with the ESA requires it to not  
5 fulfill its obligations under its contracts with the absent contractors. [...] The  
6 potential for the Federal Defendants' interests to conflict with the absent  
7 contractors' interests renders representation by existing parties inadequate.

8 *NRDC*, 539 F. Supp. 2d at 1187-88.

9 Federal courts in other jurisdictions have also noted the different interests of a federal  
10 agency and other parties seeking intervention. The Third Circuit concluded that "when an  
11 agency's views are necessarily colored by its view of the public welfare rather than the more  
12 parochial views of a proposed intervenor whose interest is personal to it," the presumption of a  
13 shared "ultimate objective" does not apply and the burden of showing inadequate representation  
14 "is comparatively light." *Kleissler*, 157 F.3d at 972. Noting that "the government represents  
15 numerous complex and conflicting interests" in environmental matters, the court found that "the  
16 straightforward business interests asserted by intervenors here may become lost in the thicket of  
17 sometimes inconsistent governmental policies. [...] Although it is unlikely that the intervenors'  
18 economic interest will change, it is not realistic to assume that the agency's programs will remain  
19 static or unaffected by unanticipated policy shifts." *Id.* at 973-74 (internal citations omitted).

20 The Northern District of Alabama, in considering a municipal water board's application  
21 for intervention in a suit against a federal agency with the potential to affect municipal water  
22 supply, agreed with the logic of *Southwest* and *Kleissler* in finding that a municipal water district  
23 was not adequately represented by the State of Alabama. *Alabama v. United States Army Corps*  
24 *of Engineers*, 229 F.R.D. 669 (N.D. Ala. 2005). In *Alabama v. United States Army Corps of*  
25 *Engineers*, Montgomery's municipal water works board sought intervention in a suit by Alabama  
26 challenging the Corps' management of reservoirs upstream from Alabama. *Id.* Allowing the  
27 board's intervention as a matter of right, the court found that "[i]n contrast to Alabama's general  
28 representation of all its citizens' socially, economically, and politically diverse interests in water  
allocation, the Montgomery Water Works Board specifically desires to protect the quality and  
quantity of water available particularly to it and its customers." *Id.* at 675. Because the state's

1 “political obligation to balance a wide range of competing interests in water from the [upstream  
2 reservoirs] could well lead to a result in some degree detrimental to [the movant’s] special  
3 interests,” the state was an inadequate representative of the board’s interest and the board could  
4 intervene as of right. *Id.*

5 Just as the federal agencies in *Southwest*, *NRDC*, and *Kleissler* did not adequately  
6 represent the interests of beneficiaries of federal contracts, and just as the state-wide entity in  
7 *Alabama* did not adequately represent the interests of a municipal water district in its particular  
8 water supply, here, the Federal Defendants do not adequately represent Westlands’ interests as  
9 beneficiaries of federal water supply contracts. Whereas Westlands is devoted to a single goal,  
10 *i.e.*, preserving its contractual rights under Repayment Contracts so it can continue to provide  
11 CVP water to its water users, Federal Defendants are obligated to consider a multitude of factors,  
12 including not only conflicting social and environmental interests but also the extent of each  
13 agency’s resources. Moreover, given the inevitable leadership changes that occur repeatedly in  
14 the executive branch of the federal government, there can be no assurance that the position of the  
15 federal government in this litigation will be static or that Westlands can rely upon current or  
16 future agency decision-makers to protect Westlands’ contract rights. Given the potential  
17 divergence of their interests, it cannot be said that Federal Defendants will “undoubtedly” make  
18 all the arguments that Westlands would make and thus the Ninth Circuit’s criteria for adequate  
19 representation by an existing party is not satisfied. At a minimum, Federal Defendants’  
20 representation “may be” inadequate to protect Westlands’ interest and this intervention is proper.  
21 Accordingly, Westlands’ motion to intervene as of right should be granted.

22 **B. In The Alternative, The Court Should Allow Westlands To Intervene Under**  
23 **Rule 24(b)**

24 In the alternative, the Court should exercise its discretion to allow Westlands to intervene  
25 pursuant to Rule 24(b)(1)(B). Permissive intervention is appropriate where the intervenor has a  
26 claim or defense that shares with the main action a common question of law or fact. *See*  
27 *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996). Here, there can be  
28

1 no question that Westlands' defense of its Repayment Contracts shares common questions of law  
2 and fact with Plaintiff's claims to invalidate those same contracts. In addition, Westlands'  
3 defense of its contracts shares common questions of law and fact with the Federal Defendants'  
4 defense in this action.

5 **IV. CONCLUSION**

6 For the foregoing reasons, Westlands respectfully requests that the Court grant its motion  
7 to intervene as a defendant in this action.

8 Dated: March 17, 2021

CYNTHIA J. LARSEN  
JUSTIN GIOVANNETONE  
MARK C. SMITH  
ORRICK, HERRINGTON & SUTCLIFFE LLP

11 By: /s/ Cynthia J. Larsen  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 17, 2021, I electronically filed WESTLANDS WATER DISTRICT'S NOTICE OF MOTION, MOTION, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS with the Clerk of Court using the ECF system, which will automatically send email notification to the attorneys of record.

/s/ Cynthia J. Larsen  
CYNTHIA J. LARSEN